

FOR PUBLICATION

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IN THE

COURT OF APPEALS OF INDIANA

JAMES M. HINES, SR. and)
ANDREA L. HINES, on behalf of)
their minor son,)
JAMES M. HINES, JR.)

Appellants-Plaintiffs)

vs.)

CASTON SCHOOL CORPORATION)

Appellee-Defendant)

No. 25A05-9401-CV-22

APPEAL FROM THE FULTON CIRCUIT COURT
The Honorable Douglas B. Morton, Judge
Cause No. 25C01-9212-CP-404

SHARPBACK, C. J.

June 8, 1995
OPINION
FOR PUBLICATION

Among the essential functions of our constitutional law is the resolution of conflicts between the rights of the individual and the interests of the community. This case illustrates how one such conflict may be played out upon a field so small as the ear lobe of a ten year-old boy.

In September, 1991, Jimmy Hines, a fourth-grader, began wearing a single gold stud earring to school at Caston Elementary School in Fulton County. Jimmy had attended Caston Elementary since first grade, but was considered a transfer student because he did not live in one of the four townships constituting the Caston school district. Jimmy and his parents, James and Andrea Hines, lived in Union Township, which had entered into a contract with Caston and two other school districts for the education of the town's children.

Shortly after Jimmy wore his earring to school, the Hineses were asked to meet with Russell Phillips, principal of the school. Phillips informed the Hineses that although the elementary school had no written dress code, the Caston junior and senior high schools, which are housed in the same facility with the elementary school, had a rule prohibiting the wearing of earrings by male students. On November 18, 1991, David M. McKee, superintendent of the Caston School Corporation, sent a letter to the Hineses stating as follows:

"Your son wearing an earring is in violation of the school's policy. The wearing of a bandage over the earring for the purpose of covering it is not acceptable.

Upon receipt of this letter, Jimmy is to discontinue wearing the earring at Caston Elementary School. Mr. Phillips has been requested to take appropriate steps to enforce this policy."

Record, p. 213. Jimmy continued to wear the earring, however, and principal Phillips took no action to enforce the superintendent's order.

On July 21, 1992, the Caston Board of School Trustees approved a revised elementary student handbook that included the following provision:

"Students are not to wear jewelry or other attachments not consistent with community standards or that could pose a health or safety hazard to either the student himself or to other students in his presence."

Record, p. 219. The Hineses were notified of the new rule on July 27, 1992. They requested clarification of the rule, and time was allotted to satisfy their request on the agenda of the school board meeting on August 4, 1992. The Hineses failed to attend the meeting.

On August 18, 1992, Jimmy wore his earring on the opening day of school. At 10:00 a.m., he was asked to remove the earring. Upon his refusal to do so, principal Phillips suspended Jimmy from classes for four and one-half days. On August 24, 1992, the Hineses, through counsel, requested a hearing on the suspension. On August 25, 1992, Phillips suspended Jimmy for an additional five days or until he returned to school not wearing the earring.

A hearing on the matter was held on September 9, 1992, with

high school principal James Hanna serving as hearing examiner. On September 11, 1992, the hearing examiner issued his findings and recommendation that Jimmy be transferred to either of the two other schools that accept students from Union Township, both of which permit male students to wear earrings. On September 29, 1992, the Caston school board adopted the hearing examiner's findings and recommendation. Rather than transfer to another school, Jimmy stopped wearing the earring to school.

On December 1, 1992, the Hineses filed their complaint against the Caston School Corporation for a declaratory judgment and injunctive relief. The case was tried before the court on August 2, 1993. On September 30, 1993, the court ruled in favor of the Caston School Corporation, stating that the rule prohibiting male students from wearing earrings was proper and should not be enjoined from enforcement. The trial court held that the Hineses "not only failed to show that there was no basis for the governmental policy," but that the Caston School's had "showed affirmatively that their policy was not irrational or arbitrary." Record, p. 200-01. The court found further that

"[t]he enforcement that bars males from wearing earrings is in keeping with legitimate educational goals of the Caston School District; the plaintiffs have failed to show that the rule is arbitrary while the school has shown a nexus between this rule and its goals."

Record, p. 202.

We note that the trial court entered a general judgment accompanied by a memorandum discussing the facts of the case, the applicable law, and the court's reasoning. Under Ind. Trial Rule

52(A)(1), a trial court is required to make special findings of fact without request in granting or refusing preliminary injunctions. We will treat the trial court's memorandum as special findings, and we may not set aside the findings or judgment unless clearly erroneous, with due regard given to the opportunity of the trial court to judge the credibility of the witnesses. T.R. 52(A).

The Hineses present one issue for our review, which we restate as whether the trial court erred in finding that the Caston Elementary School's rule prohibiting the wearing of earrings by boys did not violate Jimmy's constitutional rights under the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.¹

It is well-settled in American jurisprudence that neither teachers nor students shed their constitutional rights "at the schoolhouse gate." Tinker v. Des Moines Indep. Com. Sch. Dist. (1969), 393 U.S. 503, 89 S.Ct. 733, 736, 21 L.Ed.2d 731.

"In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State."

89 S.Ct. at 738. In determining whether the trial court erred, our task is to examine the earring ban in light of the constitutional

¹The Hineses mention the provisions of the Indiana Constitution parallel to the provisions of the United States Constitution cited here, but provide no authority or argument for a separate and independent standard under the Indiana Constitution. Thus, we may not address the Hineses' state constitutional claims. See St. John v. State (1988), Ind., 523 N.E.2d 1353, 1355.

standards applicable under each of the constitutional provisions invoked by the Hineses.

I

The essence of the Hineses' due process argument is that Jimmy's fundamental right to the possession and control of his own person in matters of personal appearance is denied by the earring ban.

In Kelley v. Johnson (1976), 425 U.S. 238, 96 S.Ct. 1440, 47 L.Ed.2d 708, the United States Supreme Court assumed the existence of a liberty interest within the Fourteenth Amendment in matters of personal appearance. Id., 425 U.S. at 244, 96 S.Ct. at 1444. Prior to Kelley, the nature of this liberty interest had been explored in a trilogy of Seventh Circuit opinions addressing students' challenges to public school hair-length regulations² and in numerous decisions in other federal circuits.³ We need not

²Breen v. Kahl (7th Cir. 1969), 419 F.2d 1034, 1036, cert. denied, 398 U.S. 937, 90 S.Ct. 1836, 26 L.Ed.2d 268; Crews v. Cloncs (7th Cir. 1970), 432 F.2d 1259; and Arnold v. Carpenter (7th Cir. 1972), 459 F.2d 939. The Hineses argue that these "long hair" cases provide a standard for evaluating the present case. We find Breen, Cloncs, and Arnold distinguishable in that "it would be impossible to comply with the long hair regulation during school hours and follow the wishes of the students and their parents as to hair length outside the school." Breen, 419 F.2d at 1037-38. "[S]ince the impact of hair regulations extends beyond the schoolhouse gate, the degree of state infringement on personal rights is significantly greater than in many other areas of school discipline." Crews, 432 F.2d at 1264. In the present case, Jimmy's freedom to wear an earring beyond the schoolhouse gate is in no way impaired by the school board's rule.

³See, e.g., Gfell v. Rickelman (6th Cir. 1971), 441 F.2d 444; Richards v. Thurston (1st Cir. 1970), 424 F.2d 1281; Jackson v. Dorrier (6th Cir. 1970), 424 F.2d 213, cert. denied, 400 U.S. 850, 91 S.Ct. 55, 27 L.Ed.2d 88; Griffin v. Tatum (5th Cir. 1970), 425 F.2d 201; Ferrell v. Dallas Independent School District (5th Cir.

declare the existence of such a liberty interest for the purposes of this opinion; nonetheless, we find persuasive the sentiments of the Eighth Circuit:

"We believe that, among those rights retained by the people under our constitutional form of government, is the freedom to govern one's personal appearance. As a freedom which ranks high on the spectrum of our societal values, it commands the protection of the Fourteenth Amendment. [citation omitted] The importance attached to such personal freedom has been long recognized. Writing in 1891, Justice Gray said:

No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley, 'The right to one's person may be said to be the right of complete immunity: to be let alone.' [Union Pacific Railway Company v. Botsford, 141 U.S. 250, 251, 11 S.Ct. 1000, 1001, 35 L.Ed. 734 (1891).]"

Bishop v. Colaw (8th Cir. 1971), 450 F.2d 1069, 1075. Thus, we will assume for the sake of argument that Jimmy possesses a constitutional right to freedom in matters of his personal appearance via the Due Process Clause of the Fourteenth Amendment.

We note that the Hineses stipulated at trial that they do not seek to establish that Jimmy's wearing of an earring is protected speech under the First Amendment. This is of consequence in that Jimmy's constitutionally protected liberty interest in personal appearance must not be confused with his constitutionally protected freedom of expression. Under the standards of First Amendment

1968), 392 F.2d 697, cert. denied, 393 U.S. 856, 89 S.Ct. 98, 21 L.Ed.2d 125.

jurisprudence, a restriction on free expression can be no greater than is essential to the furtherance of a substantial government interest. See United States v. O'Brien (1968), 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672. Under the due process standard set forth in Kelley, "the test is whether the challenger can demonstrate that there is no rational connection between the policy and accomplishment of a public purpose." Pence v. Rosenquist (7th Cir. 1978), 573 F.2d 395, 398 (citing Kelley, 425 U.S. at 247).⁴ Thus, a rational basis test applies here and the

⁴We disagree with the dissent's assertion that Kelley and Pence may not be applied to the present case because they were decided in the context of a government infringement upon the rights of public employees. In both cases, the challenger's employment was a significant factor in the court's analysis, but we reject the dissent's argument that the standard of review should be higher and the burden placed with the school system because Jimmy "brings his challenge as a common citizen," not as "an adult who voluntarily chose government employment." Slip Op. at 5. Public school students in the school environment, like public employees on the job, are subject to behavioral restrictions that infringe on the freedoms they enjoy when engaged in life outside the schoolhouse gate. "[T]he right to appear au naturel at home is relinquished when one sets foot on a public sidewalk. Equally obvious, the very nature of the public school education requires limitations on one's personal liberty in order for the learning process to proceed." Richards v. Thurston (1st Cir. 1970), 424 F.2d 1281, 1285. Indeed, a child receiving a state mandated and provided education is in an environment that by its nature must be subject to strict controls on the conduct of teachers and students. As Justice Powell wrote, "The primary duty of school officials and teachers . . . is the education and training of young people. A State has a compelling interest in assuring that the schools meet this responsibility. Without first establishing discipline and maintaining order, teachers cannot begin to educate their students."

New Jersey v. T.L.O. (1985), 469 U.S. 325, 350, 105 S.Ct. 733, 747 (J. Powell, concurring). Thus, just as myriad demands are placed upon police officers that may infringe on an officer's freedom of choice, myriad restrictions are placed upon students' behavior in the course of the school day, and the clear necessity for such restrictions justifies the presumption under the rational basis standard that the school regulation is constitutional. We note, in

burden is on the Hineses to show that the earring rule has no rational basis.⁵

addition, that this presumption is further warranted by the fact that a school system's power to maintain order in the schools is accompanied by a common law duty to exercise ordinary and reasonable care for the safety of the children under its authority, the violation of which may subject a school system to liability. See Miller v. Griesel (1974), 261 Ind. 604, 308 N.E.2d 701, 705.

⁵The dissent asserts that a more rigorous standard is required to be applied under the Indiana Code provisions governing the rulemaking authority of school boards. Ind. Code § 20-8.1-5-2 provides, in pertinent part:

"The governing body may make written rules and establish written standards concerning student conduct which are reasonably necessary to carry out, or to prevent interference with carrying out, an educational function or school purpose."

I.C. § 20-8.1-5-2(b). This delegation of authority is qualified as follows:

"Rules, standards or actions which interfere with a constitutionally protected fundamental student right shall be valid only in instances where they are necessary to prevent an interference with the educational function of the school. All rules, standards or actions shall be reasonably necessary in carrying out school purposes, and all rules, standards or actions shall be narrowly constructed in order to accomplish their purpose with minimal infringement on constitutionally protected rights."

I.C. § 20-8.1-5-3(a).

The dissent mistakenly treats this statute as a mandate from the legislature directing what construction the judiciary is to place on constitutional provisions. Interpreted as such, the statute itself may be unconstitutional, but we are not faced with that question here. See State ex rel. Kostas v. Johnson (1946), 224 Ind. 540, 69 N.E.2d 592, 595 ("Any act by which the Legislature [sic] attempts to hamper judicial functions or interfere with the discharge of judicial duties is unconstitutional and void."), and 16 C.J.S. Constitutional Law § 116 ("It is beyond the power of the legislature to place a binding construction on a constitutional provision."). The statute is, rather, a limitation on the rulemaking authority of school boards, and the question of whether the school board exceeded its authority in promulgating a particular rule is distinct from the question of whether a particular rule is unconstitutional. Indeed, a school board may be statutorily restricted from making rules which are otherwise constitutional. The Hineses did not challenge the earring ban on the basis that the school board exceeded its statutory authority,

The Hineses have argued throughout the proceedings in this case that the ban on earrings serves no purpose rationally related to the educational function of the school. At trial, the Hineses presented evidence intended to refute the school board's reasons for imposing the ban and to support the Hineses' contention that the wearing of earrings by males is not inconsistent with community standards in the Caston area.

The Caston School Corporation argued to the trial court that the earring ban, as one aspect of the school dress policy, serves several purposes related to education: First, the policy creates discipline, a sense of pride, and positive attitudes among students because it discourages rebellion against local community standards of dress, under which earrings are considered female attire. Second, by creating a positive environment, the policy fosters higher rates of attendance, a lower dropout rate, and higher levels of academic achievement of students in the Caston schools. Third, the policy helps prevent the influx into the schools of gangs and cults, for which the wearing of an earring may symbolize membership. Fourth, the policy helps discourage students' identification with drug use or homosexuality, either of which may be symbolized by the wearing of an earring. Fifth, the policy addresses safety concerns in that male students are more inclined to roughhousing than female students, particularly during gym class, and thus an earring may result in injury to an ear lobe or to the wearer's head.

and thus that question is not before us.

Upon an examination of the record, we find that several of the school board's arguments in favor of the ban are unsupported by evidence. For example, no evidence was offered of a correlation between earrings and cults or homosexuality, and a board member admitted that to his knowledge no cults or gay population existed in the Caston schools.⁶ While board members had heard of other communities where earrings were associated with gangs, no evidence was presented to show that gangs existed in the Caston schools, and a board member admitted that he did not think that every male that wears an earring is a member of a gang. The school's safety concerns, as well, seem dubious in light of evidence that female students, who are permitted to wear earrings to school in Caston, avoid injury by removing their earrings before gym class.

On the other hand, evidence was presented that the enforcement of a strict dress code was a factor in improving students' attitudes toward school, and that this change in attitude had led to improvements in school attendance, drop-out rates, and academic performance. Evidence was presented that under local community standards of dress, earrings are considered female attire, and that the earring rule discourages rebelliousness. Evidence was presented that the wearing of earrings by males was inconsistent with community standards in the Caston area, which is, by all accounts, politically and religiously conservative. Members of the Caston school board and school administrators testified that the

⁶To the extent that the wearing of an earring is an expression of sexual orientation, it may be a protected form of speech, but we are not presented with that question here.

earring ban serves to prevent "disrespect for authority and disrespect for discipline within the school" by maintaining "a basic standard for the children to live by." Record, p. 439-40.⁷

It is reasonable that a community's schools be permitted, within constitutional strictures, to reflect its values, and it is a valid educational function to instill discipline and create a positive educational environment by means of a reasonable, consistently applied dress code. Under a due process standard, this is sufficient to show a rational relationship between the rule and "some purpose within the school's competence." Arnold, supra.⁸

Thus, we agree with the trial court that the Hineses have failed to show that the earring ban serves no purpose rationally

⁷The dissent asserts that elected school officials "should not be in the business of dictating the standards of the community." Slip Op. at 10. We agree, but we note that school board members are elected officials charged by their constituents with the responsibility to "make decisions pertaining to the general conduct of the schools." I.C. § 20-4-8-11(a). The formulating of standards of appearance for children in school is an aspect of their responsibility, and such decisions cannot be made without reference to community standards, as imprecise and changeable as such standards may be. In the present case, the school board did not dictate community standards but formulated school policy in response to expressions of the community's will.

More importantly, perhaps, we believe that it is not the business of the courts to determine community standards or to become arbiters of acceptable fashion in the public schools.

⁸It is among a school system's statutorily mandated educational functions to promote knowledge and learning and to maintain an orderly and efficient educational system. I.C. §§ 20-8.1-1-8, -9. We disagree with the dissent's contention that the ban must be shown to be necessary to prevent an interference with educational functions. If it were required to be shown that the wearing of an earring had caused interruptions in classroom instruction or fights on the playground before a ban on earrings could be justified, few school dress restrictions could be upheld, including rules requiring no more than neat, clean attire.

related to the educational function of the school and that, as a result, their due process challenge to the ban must fail.

II

The Hineses' equal protection argument is premised upon the contention that Jimmy has been denied the equal protection of the law because girls are permitted to wear earrings to Caston Elementary School while boys are not. A gender-based discriminatory classification is subject to an intermediate level of scrutiny. S.V. v. Estate of Bellamy (1991), Ind.App., 579 N.E.2d 144, 146. The burden is on the challenger to show "that the gender-based classification does not substantially relate to a legitimate government objective." Olesen v. Board of Educ. of School Dist. No. 228 (N.D.Ill. 1987), 676 F.Supp. 820, 823 (citing O'Connor v. Board of Educ. of School Dist. No. 23 (7th Cir. 1981), 645 F.2d 578, 581). Again, the Hineses argue that no legitimate government objective justifies the sex-based discrimination inherent in the earring rule. We disagree.

The provision of the elementary school dress code at issue here states that "[s]tudents are not to wear jewelry or other attachments not consistent with community standards" Record, p. 249. The dress code prohibits all students from wearing jewelry inconsistent with community standards, without respect to gender. As noted above, evidence was presented demonstrating that the wearing of earrings by males is inconsistent with community standards of dress in Caston. The enforcement of community standards of dress to instill discipline has been shown to be a

legitimate educational function. Thus, the Hineses have failed to show that the prohibition on the wearing of earrings by boys violates equal protection because it does not substantially relate to a legitimate government objective.

Accordingly, the trial court's judgment denying the Hineses' action for a declaratory judgment and injunctive relief is affirmed.

AFFIRMED.

GARRARD, J. CONCURS

BARTEAU, J. DISSENTS WITH SEPARATE OPINION